STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
PEDRO A. COLON, JUDGE

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

GRANT F. LANGLEY
City Attorney

JOHN J. HEINEN
Assistant City Attorney
State Bar No. 01008939
Attorneys for Plaintiff-Respondent-Petitioner

ADDRESS:
200 East Wells Street, Room 800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-0806
jheine@milwaukee.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL REGULATIONS

CONSTITUTIONAL PROVISIONS

ISSUE PRESENTED FOR REVIEW

When a public housing authority commences an eviction action, based on a tenant's illegal activity, is Wisconsin's right-to-cure statute, Wis. Stat. § 704.17(2)(b), pre-empted because the statute conflicts with the federal "One Strike and You're Out" initiative?

Answered by circuit court: Yes.

Answered by court of appeals: No.

STATEMENT OF THE CASE

This is an eviction action brought by the Petitioner landlord, Housing Authority of the City of Milwaukee (HACM). HACM is a public body, organized and chartered pursuant to Wis. Stat. § 66.1201, for the purpose of operating a low-income housing program under the United States Housing Act of 1937, as amended, codified at 42 U.S.C. § 1437, *et seq.* It is funded by the United States Department of Housing and Urban Development (HUD) and regulated by Title 24 of the Code of Federal Regulations. Mr. Cobb leases a public housing unit at HACM's Merrill Park housing development under a one-year lease.

HACM's funding is dependant on its compliance with the federal regulations that govern public and Indian housing. *See* 24 C.F.R. Ch. IX, Parts 900-971. Pursuant to those federal regulations, HACM enters into written contracts, called Annual Contributions Contracts, under which HUD agrees to provide funding for its programs and HACM agrees to comply with HUD regulations for the programs. 24 C.F.R. § 5.403, Definitions. These funding requirements imposed on HACM by HUD significantly

affect HACM's role as a landlord in the community and, in large part, dictate its relationship to its tenants.

FACTS

On June 5, 2013, James Darrow, a HACM Public Safety Officer, with 14 years experience, was patrolling the hallways of HACM's Merrill Park public housing development building. While on the fourth floor, Officer Darrow detected the scent of smoked marijuana. Officer Darrow, after checking a number of doors on the fourth floor, determined that the marijuana odor was strongest outside the door to unit 414, leased solely by the Defendant-Appellant-Respondent, Felton Cobb (APPX-144-148)[1]. Officer Darrow pursued his investigation by knocking on the door to unit 414. The tenant, Mr. Felton Cobb ("Cobb"), opened the door approximately 12 inches. Officer Darrow observed the odor of burnt marijuana intensify when the door was opened (A-73). When questioned regarding the source of the odor, Cobb initially stated it was due to his spraying bug spray in his unit. Later, in their five to

[1] In this brief, references to specific portions of the Appendix of Plaintiff-Respondent-Petitioner will be denoted as: (APPX-____). References to the Appendix of the Defendant-Appellant-Respondent in the Court of Appeals will be denoted as: (A-____).

seven minute conversation, Cobb attributed the odor Officer Darrow had detected to his own cooking. Ultimately, Officer Darrow concluded that Cobb had been smoking marijuana in violation of his lease. (APPX-151-152).

In a communication to Cobb dated June 9, 2013, HACM notified the tenant that he had violated the terms of his lease on June 5th through his illegal drug use. On June 26, 2013, HACM provided Cobb with a 14-day Notice terminating his tenancy due to his drug-related activity on the premises. This lease termination notice served on Cobb did not offer Cobb a 5-day opportunity to remedy or cure his default as provided for in Wis. Stat. § 704.17(2)(b) (APPX-182-184).

With respect to the type of lease termination notice required to evict tenants from federally-funded housing, 24 C.F.R. § 966.4(f)(*l*)(3) provides:

> (3) *Lease termination notice.* (i) The PHA must give written notice of lease termination of:
>
> (A) 14 days in the case of failure to pay rent;
>
> (B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days):
>
> (1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or

> (2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity;

Both Cobb and Public Safety Officer Darrow testified in the eviction action before the trial court. Although Cobb denied he had used marijuana, the circuit court concluded that Officer Darrow was the more consistent and more credible witness (APPX-165). The trial court also concluded that illegal drug-related activity was engaged in by Cobb (APPX-166). Finally, and most significantly for purposes of this appeal, the trial court found that, consistent with *Dep't. of Hous. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002), and *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apts.*, 890 A.2d 249 (D.C. 2006), where criminal activity is found by the trial court, there does not have to be a cure offered the tenant prior to eviction (APPX-172).

On appeal, the District I Court of Appeals found that HACM's failure to offer Cobb the right to cure his lease violation in the lease termination notice disposed of the controversy by depriving the circuit court of competency to adjudicate the eviction action. (Ct. App. Decision ¶¶ 1, 2, and 14; APPX-101-104 and APPX-113.)

In rejecting HACM's position that Federal pre-emption relieved it of the obligation to offer the tenant a "right to cure," the Court of Appeals analyzed the three sets of circumstances where federal law pre-empts state law. Noting that two of the three circumstances were not at issue, the Court of Appeals found no "preemption requisites" to conclude that there exists a conflict between the right-to-cure provision in Wis. Stat. § 704.17(2)(b) and the manifest objectives of Congress in enacting 42 U.S.C. § 1437d(*l*)(6), which provides:

> Each public housing agency shall utilize leases which[:]
>
> * * *
>
> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or <u>any drug-related criminal activity on or off such premises, engaged in by a public housing tenant</u>, any member of the tenant's household, or any guest or other person under the tenant's control, <u>shall be cause for termination of tenancy</u>.

(underscoring added).

ARGUMENT

I. Wisconsin's "Right to Cure" Statute, § 704.17(2)(b), Significantly Interferes with the Purposes and Objectives of Congress, Expressed in Federal Statutes and Regulations, in Addressing Criminal Activity in Public Housing.

A. Legal Standards of Pre-emption

The framework for federal pre-emption of state laws and regulations is well established and familiar to this Court. *Miller Brewing Co. v. Dep't of Indus., Labor and Human Rels., Equal Rights Div.,* 210 Wis. 2d 26, 34-35, 563 N.W.2d 460, 464 (1997). As the Court of Appeals stated: "Federal preemption is based on Article VI of the United States Constitution, which makes federal law 'the Supreme law of the land.'" (Ct. App. Decision at ¶ 4, p. 4; APPX-104). *Estate of Kriefall ex rel. Kriefall v. Sizzler USA Franchise, Inc.*, 265 Wis. 2d 476, 484, 665 N.W.2d 417, 421 (2003) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and U.S. CONST. Art. VI).

Federal law pre-empts state laws in any of the following situations:

> - When federal statutes or regulations expressly provide for pre-emption. ("Express pre-emption").
> - When the "scheme of federal regulation" from statutes and/or regulations is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." ("field pre-emption")
> - When the state and federal laws conflict, either because:
>   - Compliance with both at the same time would be a "physical impossibility," for example because one bans something that the other requires ("conflict pre-emption"), or
>   - *"state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"("frustration of purpose pre-emption").*

(emphasis added). *See*, *e.g. Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In this case, the circumstances last-described above are present because there is a conflict between federal law and Wis. Stat. § 704.17(2)(b) and that conflict constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

This third form of pre-emption, known as "frustration of purpose pre-emption," has been addressed by the United States

Supreme Court on numerous occasions. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000); *Barnett Bank*, *supra*; *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines v. Davidowitz*, *supra*. These cases hold that a state law is pre-empted if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law. *See Crosby*, 530 U.S. at 373. A state law will be pre-empted even though the state law does not completely block the objectives of the federal law. If a state law significantly interferes with, limits, or constrains the exercise of the full authority granted by the federal law, courts have held that the state law is pre-empted in such circumstances. *See e.g., Barnett Bank*, 517 U.S. 31-32 (rejecting argument that state law may merely limit, without blocking, exercise of National Bank's authority granted by National Bank Act.)

B. Federal Statutes and Regulations Pre-empt a Requirement that Public Housing Authorities, per Wis. Stat. § 704.17(2)(b), Must Offer Tenants an Opportunity to Cure Drug-Related or Other Criminal Activity.

HACM submits that Wisconsin's five-day statutory cure period "stands as an obstacle to the accomplishment and execution of the full purposes and objectives," of the anticrime provision in 42 U.S.C. § 1437d(*l*)(6). Congress expressly decreed that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe and free from illegal drugs." 42 U.S.C. § 11901(1), as enacted by Section 581(a) of Pub. L. 100-690, 104 Stat. 4079 (1990) (underscoring added).

In *Dep't. of Hous. [HUD] v. Rucker*, *supra*, the Supreme Court interpreted the scope of the authority conferred in the anticrime provision when it rejected a challenge to the constitutionality of Oakland, California's public housing authority (PHA) evicting tenants who neither committed the crimes at issue, knew or reasonably should have known about the crimes, nor were able to physically control the conduct of the persons who committed

the crimes. *See Rucker* at 130-31. The Supreme Court focused on the statutory language providing that "any" statutorily-mentioned criminal activity by a statutorily-prescribed person was cause for lease termination, and observed that "the word 'any' has an expansive meaning." Ultimately, the Supreme Court concluded the tenants' evictions were lawful. *Id.* at 131. Thus, the purpose of the statute at issue here, 42 U.S.C. § 1437d(*l*)(6), is to prevent crime in public housing by enabling and facilitating the eviction of tenants when they, their households, guests, and persons under their control, engage in drug-related criminal activity or commit crimes that threaten the health, safety or right of peaceful enjoyment of the premises of other tenants at the building. The *Rucker* Court found the federal purpose so compelling, it ruled that "no fault" or "innocent tenant" evictions were "entirely reasonable." *Rucker* at 132.

Subsequent to the *Rucker* decision, the highest court in Massachusetts considered to what extent a state statute that afforded an "innocent tenant defense" in certain eviction actions "remains viable in the termination of tenancies in federally assisted public

housing projects." *Boston Hous. Auth. v. Garcia*, 449 Mass. 727, 729, 871 N.E.2d 1073, 1075 (2007). In that case, the Supreme Judicial Court agreed "that Federal housing law preempts Massachusetts law that would otherwise permit a public housing tenant to defeat a lease termination" in light of a pre-emption argument advanced in that case. *Garcia* at 729. More specifically, that court recognized that one of the circumstances where pre-emption exists, and where state law must yield, is where th[pe state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Garcia* at 733, quoting *Geier v. Am. Honda Motor Co.*, *supra*, 529 U.S. at 873. In doing so, the Massachusetts court noted:

> Congress (through 42 U.S.C. § 1437d(*l*)(6)), and HUD (through its implementing regulations) have required that housing authorities use clauses in their leases that permit the termination of a tenant's lease for crimes committed by household members, even where a tenant had no knowledge of and was not at fault for a household member's criminal activity. As the *Rucker* Court noted, the lodging of such discretionary authority with the housing authorities is integral to the accomplishment of the congressional objective because "[s]trict liability maximizes deterrence and eases enforcement difficulties." *Rucker*, *supra*, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

Garcia at 734.

If public housing authorities, such as HACM, were prevented from promptly evicting tenants who engaged in drug-related or violent criminal activity, because of the need to comply with a "right to cure" statute such as Wis. Stat. § 704.17(2)(b), such a result, just as in Massachusetts, would run afoul of and substantially interfere with the congressional objective. Under such circumstances, the state law must yield to the provisions authorized by federal law. As the Massachusetts Court stated, under a similarly restrictive state statute:

> If it were not, a judge could permit a tenant to demonstrate that she was an "innocent tenant" and consequently determine that eviction was not appropriate. The housing authority would thus have lost the ability to terminate a tenant who violated her lease by not preventing her household member from engaging in drug related criminal activity, an ability Congress intends to preserve for housing authorities "who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 42 U.S.C. § 11901(2) (1994 ed. and Supp. V), 'the seriousness of the offending action,' 66 Fed. Reg., at 28803 [codified at 24 C.F.R. § 966.4(1)(5)(vii)(B)], and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action. [*Id.*] *Rucker*, *supra* at 134.

Garcia at 734-735.

Applying the "right to cure" clause in Wis. Stat. § 704.17(2)(b) would frustrate this Congressional purpose by severely limiting when the right of eviction for criminal and drug-related activity could be exercised. In that respect, Wis. Stat. § 704.17(2)(b) provides that, if a tenant breaches a lease, as here, based on illegal drug activity, the tenant is given notice of an opportunity to remedy that breach. The statute further provides that:

> [A] tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence . . .."

Cobb's position before the Court of Appeals was that Wis. Stat. § 704.17(2)(b) properly affords a tenant "one warning to remedy a breach within five days, . . . (t)he tenant must take reasonable steps to eliminate the problem. Reasonable steps would seemingly include ceasing the activity . . .." (Brief of Defendant-Appellant, p. 25.) Under Cobb's reasoning, absent a second offense within five days, the tenant decides whether he should stay or go. Moreover, under Cobb's rationale, a tenant who commits a sexual assault, or armed robbery of his neighbor, even a homicide, could raise the same defense.

As argued in *Scarborough* and quoted by the Court of Appeals (APPX-110), the only way to make sense of the notion of curing criminal activity is to require the tenant not to engage in such activity again.

> But[. . .] this interpretation quickly renders the eviction provision a virtual nullity, because the grounds for eviction – the criminal act – would be washed away by a simple promise not to commit another crime.

Scarborough at 257. The ease of thwarting the landlord's right to evict a tenant who committed such a crime is sufficient for the Wisconsin statute's (§ 704.17(2)(b)) "right to cure" provision to constitute an "obstacle" to the purposes of 42 U.S.C. § 1437d(*l*)(6).

What Congress intended to be a "One Strike" statute could easily be converted into a law under which a tenant would be afforded additional "strikes" annually. Again, the ease with which the tenant could thwart the landlord's right to evict sufficiently frustrates the purpose of the "One Strike" initiative to trigger pre-emption of the "right to cure" clause.

II. **"One Strike" Refers to Extensive Federal Effort to Combat Crime in Public Housing, Not Just a Pamphlet and Agency Manual.**

The record before the Court of Appeals included a document, entitled: "One Strike and You're Out," Policy in Public Housing (March 1996) (Decision at ¶10; A-93-109). The Court of Appeals calls the document a pamphlet and an agency manual (Decision at ¶11; APPX-111), but neglects to note the federal statutes and regulations that have been enacted as part of the "One Strike" initiative.

As set forth by the United States Supreme Court in *Rucker*, the implementation of the "One Strike" initiative begins with the Anti-Drug Abuse Act of 1988 (codified at 42 U.S.C. § 1437d(*l*)(6)), which obligated Public Housing Authorities (PHAs) to utilize leases that provide:

> [A]ny drug-related criminal activity on or near the public housing premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(*l*)(6) (1994 ed. Supp. V). *Rucker* at 152. As the *Rucker* Court explains in footnote 4:

> A 1996 amendment to § 1437d(*l*)(6), enacted five years after HUD issued its interpretation of the statute, supports our holding. The 1996 amendment expanded the reach of § 1437d(*l*)(6), changing the language of the lease provision from applying to activity taking place "on or near" the public housing premises, to activity occurring "on or off" the public housing premises. See Housing Opportunity Program Extension Act of 1996, § 9(1)(2), 110 Stat. 836.

Rucker at 152 (footnote 4).

According to the Supplementary Information provided as background to the text of the Proposed Rule, at 64 Fed. Reg. 40262 (1999)[2]:

> President Clinton, in his 1996 State of the Union address, proposed the "one strike and you're out" policy. The President challenged local housing authorities and tenant associations to stop criminal gang members and drug dealers who were destroying the lives of decent tenants. In response to the President's "One Strike" mandate, HUD expeditiously issued guidelines and procedures and conducted extensive training for PHAs around the country.
>
> * * *
>
> Crime prevention will be advanced by the authority to screen out those who engage in illegal drug use or other criminal activity, and enforcement will be advanced by the authority to

[2] The title given the proposed rule in the 1999 Federal Register is: "One-Strike Screening and Eviction for Drug Abuse and Other Criminal Activity." *See* 64 Fed. Reg. 40262 (July 23, 1999) (notice of proposed rule making). This proposed rule was followed by a final rule (*see* 66 Fed. Reg. 28776) (May 24, 2001) and HUD's implementing regulations for the public housing program, which appear at 24 C.F.R. Parts 5, 960 and 966. The words "One-Strike" were omitted from the title of the Final Rule.

> evict and terminate assistance for persons who participate in criminal activity.
>
> * * *
>
> Sections 575-579 of the Quality Housing and Work Responsibility Act of 1998 (Public Law 105-276, approved Oct. 21, 1998, 112 Stat. 2634-2643) ("the Public Housing Reform Act" or "the 1998 Act") revised provisions of the 1937 Act (sections 6 and 16) and created other statutory authority to expand crime and security provisions to most federally assisted housing. Instead of issuing a final rule on the admission and eviction provisions of the Extension Act, HUD is publishing this new proposed rule on the provisions as they exist after the revision to the drug abuse and criminal activity requirements made by the Public Housing Reform Act.

So, 'One Strike' is far more than just a pamphlet or manual and has been recognized as such in a number of court decisions around the country. *See e.g. Rucker* at 130-134 (repeatedly referencing the "statute" and finding it unambiguous); *Scarborough* at 255 ("the issue is . . . whether . . . a congressional statute [and regulations] of national application prevail [ ] over a statute applying only to the District of Columbia."); *Boston Hous. Auth. v. Garcia* at 729 ("Federal housing law, 42 U.S.C. § 42 U.S.C. 1437d(*l*)(6) (2000) 'unambiguously' requires lease terms 'that vest local (PHAs) with the discretion to evict tenants for the drug-related activity of

household members and guests whether or not the tenant knew, or should have known, about the activity.'" (citing *Rucker*).

In addition to the statutory authority for PHAs to evict tenants engaged in illegal drug activity, as recognized by the courts, federal regulations also support the "One Strike" initiative. In that regard, although 24 C.F.R. § 966.4(*l*)(2) provides, in part, that PHAs may terminate a tenancy only for serious or repeated violations of the lease or for "[o]ther good cause," the regulations make clear that such "good cause" exists where there has been "drug-related criminal activity engaged in on or off the premises by any tenant." *See* 24 C.F.R. §§ 966.4(*l*)(2)(iii)(A) and 966.4(*l*)(5)(i)(B).

III. Federal Law Places the Discretion Over Whether to Evict with the Public Housing Authority, Not the Tenant.

Critical to understanding the issue in this appeal is recognition of who Congress intended should make the decision whether a tenant who has breached his or her lease remains in publicly subsidized housing. This issue arises because the effect of the Court of Appeals decision is to remove the ability of the PHA to elect to evict for first breaches of the lease for criminal activity.

In its analysis of the *Rucker* decision, the court in *Scarborough*, *supra*, made clear its view that, where the federal government is the landlord, Congress intended the PHA to have the authority to evict when criminal and drug-related breaches of the lease occur:

> The [*Rucker*] Court thus affirmed, in stark terms, the federal government's authority "as a landlord of property that it owns," *Rucker* at 135, to prevent crime in federally-assisted housing by permitting the eviction of tenants when they or persons they have allowed access to their premises commit crimes threatening the health or safety of other residents.
>
> * * *
>
> It is true, as the *Rucker* Court pointed out, that termination of a tenancy after a criminal activity is not automatic under federal law; housing providers have discretion whether to exercise the right of eviction. *See Rucker*, 535 U.S. at 133-34. But the cure opportunity provided by § 42-3505.01(b), if applicable to violations of "an obligation of tenancy" dangerously criminal in nature, would substitute for the landlord's discretion a mandatory second-strike opportunity for a tenant to stay eviction by discontinuing, or not repeating, the criminal act during the thirty days following notice. We do not believe Congress meant to permit that obligatory re-setting of the notice clock.

Scarborough at 257-258. (underscoring added)

While the *Rucker* and *Garcia* cases dealt with the innocent owner defense, *Scarborough* involved a 'right-to-cure' statutory

defense similar to the one under review here. All three courts found the federal statute prevailed over state statutory defenses whether in a Due Process clause analysis or by using principles of conflict pre-emption ("[local code provision] would stand as a pronounced obstacle to the exercise of this authority." *Scarborough* at 257.)

That HUD intended to vest discretion in PHAs is underscored by HUD's enacting regulations expressly intended to inform, guide, and reward the exercise of that discretion. 24 C.F.R. § 966.4(*l*)(5)(vii)(A) and (B) provides:

> (vii) PHA action, generally.
>
> (A) Assessment under PHAS. Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.
>
> (B) *Consideration of circumstances*. In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action,

> the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

(underscoring added).

Subsection (A) above illustrates the foundational policy considerations considered when deciding to reward PHAs for effective eviction policies and procedures. That is, the importance of PHAs having the discretion to evict tenants engaged in illegal activity in light of the federal interest in public housing communities and program integrity, as well as the high demand for public housing. Statutes such as Wisconsin's "right to cure" statute clearly obstruct the accomplishment of these federal interests.

IV. The Court of Appeals Overlooked Exception in Lease Section 9(C).

In its decision below, the Court of Appeals, at ¶ 6, highlighted that HACM's lease includes, at Section 9(C), the following provision:

> C. The [Housing Authority] may evict the resident only by bringing a court action. The [Housing Authority] *termination notice shall be given in accordance with a lease for one year*

> *per Section 704.17(2)* of the Wisconsin Statutes, except the [Housing Authority] shall give written notice of termination of the Lease as of:

(emphasis in original). Focusing on the italicized text, the Court emphasized that HACM has, thus, agreed in its lease to provide curable notices, as called for in Wis. Stat. § 704.17(2), and is so bound *(see also* ¶¶ 11 and 14). However, the Court failed to note the "except" that immediately follows the italicized text and provides:

> **[E]xcept** the HACM shall give written notice of termination of the Lease as of:
>
> 1. Fourteen (14) days in the case of failure to pay rent;
> 2. A reasonable time commensurate with the exigencies of the situation (not to exceed 30 days) in the case of criminal activity which constitutes a threat to other Residents or employees of the HACM or any drug-related criminal activity on or off the development grounds;
> 3. Thirty (30) days in all other cases;

(bold and underscoring added).

The exception to the statutory notice requirements carved out for notices of drug-related and other criminal activity reinforces HACM's position and serves to emphasize the federal authority for local PHAs to use their discretion in determining how best to terminate leases when the proscribed activities form the causes for termination.

In addition, lease section 5(C) provides:

> "Resident agrees:
>
> * * *
>
> C. To abide by . . . all rules, regulations, and ordinances promulgated by HUD . . . for the benefit and well being of the housing development . . ..

(A-78). Thus, the relevant lease language excepts circumstances like Cobb's illegal drug activity on the premises from the 'right to cure' clause in § 704.17(2)(b), Wis. Stat., and requires him to abide by HUD regulations, like those enacted as part of HUD's "Screening and Eviction for Drug Abuse and Other Criminal Activity," 66 Fed. Reg. 28776 (May 24, 2001).

V. Federal Regulations Work for the Benefit of All Subsidized Housing Tenants, Not Just Cobb.

As is evident from the divergent views of the parties with respect to the importance of § 704.17(2)(b), Wis. Stat. when viewed in the light of the 'One Strike' federal policy and regulations, there is a conflict in our respective views of the policies behind the statute and the regulations. The U.S. Supreme Court, Massachusetts Supreme Court, and District of Columbia Court of Appeals have reviewed these policies. Each placed greater importance on

effectuating the intent of Congress than on the state statutory rights afforded the individual affected tenants.

Also in accord is *Ross v. Broadway Towers, Inc.*, 228 S.W.3d 113 (Tenn. App. 2006). In that case, the Tennessee Court described the importance of the federal regulations, including those that entitle landlords to screen applicants and deny an application based on certain criminal conduct, as benefitting the larger subsidized housing community and its neighbors, not just the tenant under eviction.

> . . . the regulations involved in this case are for the benefit not only of Mr. Ross but also for all the other occupants of the subsidized housing project.
>
> * * *
>
> [If the tenant were to prevail and avoid eviction] [s]uch a holding would be contrary to the intent of the regulations to protect all the occupants of the subsidized housing project.

Ross at 121.

The *Ross* decision also states:

> . . . the Trial Court essentially determined that Broadway Towers had a "duty to enforce [the federal] regulations and enforce those lease provisions for the benefit of other tenants; and that they are not entitled to waive the right of other tenants to insist upon the enforcement of those regulations." In short, the Trial Court determined that the policies behind the federal regulations trumped the Landlord and Tenant Act in this regard. We agree.

The same reasoning applies in the case before this court. Cobb asserts that he is entitled to a state statutory privilege that protects him from the consequences of his illegal activity, and his breach of the lease, so long as he is not caught a second time in the ensuing 12 months following service of termination notice.

The Tennesse Appellate Court, in considering whether the particular Tennessee statute cited by the tenant in an effort to avoid eviction was applicable, went on to note:

> [W]e believe the federal public policy in providing subsidized housing that is safe and crime-free for all the tenants is paramount to any policy at issue in Tenn. Code Ann. § 66-28-508. In light of the facts presented in this case, we conclude that *even if the provisions of Tenn. Code Ann. § 66-28-508 were triggered*, application of that statute is preempted by the federal regulations because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Scarborough, 890 A.2d at 255 (quoting Boggs v. Boggs, 520 U.S. 833, 844, 117 S.Ct. 1754, 138 L. Ed. 2d 45 (1997)).

Ross at 124 (emphasis added).

As previously noted, the Massachusetts Supreme Judicial Court, in the *Garcia* case, also speaks to the policies at issue in this case. That court wrote:

> The stated public housing policy of the United States is to "promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector." 42 U.S.C. § 1437(a)(4) (2000). Consistent with this policy, Congress enacted the Anti-Drug Abuse Act of 1988, with the objective of reducing drug-related crime in public housing and ensuring "public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." *Rucker*, *supra* at 134, quoting 42 U.S.C. § 11901 (1) (1994).

Garcia at 733-734.

HACM, therefore, submits that our United States Supreme Court, the Massachusetts Supreme Judicial Court, and the District of Columbia Court of Appeals[3] have each considered the legal question before this Court. Each court decided that tenant defenses raised in eviction actions brought by PHAs due to a tenant's illegal activities must yield to the federal interests because they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[3] *See* also *Hous. Auth. of Norwalk v. Brown*, 129 Conn. App. 313, 19 A.3d 252 (2011) and *Horizon Homes v. Nunn*, 684 N.W. 2d 221 (Iowa, 2004).

HACM urges this Court to ratify the wisdom in those decisions and reach the same conclusion for public housing in Wisconsin.

CONCLUSION

Therefore, for the reasons set forth herein, the Petitioner, Housing Authority of the City of Milwaukee, respectfully requests that the Supreme Court vacate the Order and Decision of the Court of Appeals dated May 28, 2014, and reinstate the decision and order of the Circuit Court of Milwaukee County dated September 17, 2013.

Respectfully submitted, dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

GRANT F. LANGLEY
City Attorney

s/John J. Heinen
JOHN J. HEINEN
State Bar No. 01008939
Assistant City Attorney
Attorneys for Plaintiff-
Respondent-Petitioner

ADDRESS:
200 East Wells Street, Rm. 800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-0806
jheine@milwaukee.gov
1031-2013-1758/20207844

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat. for a brief and appendix produced with a proportional serif font. The length of this brief is 28 pages; 5,218 words.

Dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

s/John J. Heinen
JOHN J. HEINEN
State Bar No. 01008939
Assistant City Attorney
Attorneys for Plaintiff-Respondent-Petitioner

ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Brief and Appendix which complies with the requirements of § 809.19(12), Wis. Stat.

I further certify that the electronic Brief and Appendix is identical in text, content and format to the printed forms of the Brief and Appendix filed as of this date.

Dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

s/John J. Heinen
JOHN J. HEINEN
State Bar No. 01008939
Assistant City Attorney
Attorneys for Plaintiff-Respondent-Petitioner

CERTIFICATION OF APPENDIX

I hereby certify that filed with this Brief of Plaintiff-Respondent-Petitioner, as a separate document, is the Appendix of Plaintiff-Respondent-Petitioner's that complies with § 809.19(2)(a), Wis. Stat. and contains at a minimum: (1) a table of contents; (2) relevant trial court record entries and portions of the record essential to an understanding of the issue(s) raised, including decisions oral or written rulings or decisions showing the Circuit Court's and the Appellate Court's reasoning regarding those issue(s).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated and signed at Milwaukee, Wisconsin this 20th day of October, 2014.

s/John J. Heinen

JOHN J. HEINEN
State Bar No. 01008939
Assistant City Attorney
Attorneys for Plaintiff-Respondent-Petitioner

ADDRESS:
200 East Wells Street, Room 800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-0806
jheine@milwaukee.gov

CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY AND CERTIFICATION OF HAND-DELIVERY

I, Linda K. Dirnbauer, herein certify that I am employed by the Housing Authority of the City of Milwaukee as a Legal Assistant, assigned to duty in the City Attorney's Office, for Assistant City Attorney, John J. Heinen, which is located at 841 North Broadway, Suite 1018, Milwaukee, Wisconsin 53202; that on the 20th day of October, 2014, I sent 22 copies of the Brief of Plaintiff-Respondent-Petitioner, and 22 copies of the Appendix of Plaintiff-Respondent-Petitioner in the above-entitled case, via third-party commercial overnight delivery, addressed to: Clerk of the Wisconsin Supreme Court, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

I further certify that three copies of the Brief of Plaintiff-Appellant-Petitioner, and three copies of the Appendix of Plaintiff-Appellant-Petitioner, in the above-entitled case, were hand-delivered to counsel for the Defendant-Appellant-Respondent, Attorney April A.G. Hartman, of Legal Action of Wisconsin, Inc., located at 230 West Wells Street, Suite 800, Milwaukee, Wisconsin 53203-1700.

s/L.K.Dirnbauer
LINDA K. DIRNBAUER

Subscribed and sworn to before me
this 20th day of October, 2014.

s/John J. Heinen
Notary Public, State of Wisconsin
My Commission is permanent.

1031-2013-1758/207844